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## Notes

# Life After *Adarand*: The Future is Not So Clear

*Adarand Constructors, Inc. v. Pena*<sup>1</sup>

### I. INTRODUCTION

African-American scholar and statesman W.E.B. DuBois "predicted in 1908 that the question of this century would be the 'color-line,' meaning the relations between the white and African-American races."<sup>2</sup> His prediction came true in American politics as well as American constitutional jurisprudence. Affirmative action programs designed to remedy past wrongs against African-Americans, other minorities, and women have come under considerable attack in the last ten years. The Supreme Court of the United States has now decided in *Adarand* that any such program, whether federal, state, or local, must be analyzed with strict scrutiny to determine if it violates the Equal Protection Clause. In so doing, the Court dramatically changed the landscape of affirmative action programs in this country.

### II. FACTS AND HOLDING

Mountain Gravel & Construction Company was awarded the prime contract on a federally funded highway construction project in 1989.<sup>3</sup> Federal law required that a subcontracting clause be included in the prime contract, which provided that Mountain Gravel would receive additional compensation if it awarded subcontracts to certain small, socially disadvantaged businesses.<sup>4</sup> The required clause further provided for presumptions of "socially disadvantaged" individuals, which included "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities or any other individual found to be disadvantaged by . . . section 8(a) of the Small Business Act (SBA)."<sup>5</sup>

Pursuant to provisions of the SBA, companies found to be disadvantaged under section 8(a) have automatic eligibility for subcontractor provisions such

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1. 115 S. Ct. 2097 (1995).

2. John C. Brittain, *Developments in Human Rights Law*, CONN. LAW TRIBUNE, Dec. 25, 1995, at 16A.

3. *Adarand*, 115 S. Ct. at 2102.

4. *Id.*

5. *Id.*

as the one in Mountain Gravel's contract.<sup>6</sup> In order to receive the additional compensation provided for in the prime contract, companies like Mountain Gravel only needed to award the subcontracts to such a "socially disadvantaged" business.<sup>7</sup>

Mountain Gravel opened a bidding process for the guardrail portion of the highway project.<sup>8</sup> Adarand Constructors, Inc. submitted the low bid on the project, but was not qualified as a socially disadvantaged business.<sup>9</sup> Gonzales submitted a higher bid, but qualified under the applicable statutes as a "socially disadvantaged" business.<sup>10</sup> Mountain Gravel awarded the contract to Gonzales, stating that it would have accepted Adarand's bid had it not been for the additional compensation it would receive by awarding the contract to Gonzales.<sup>11</sup>

Having lost the contract, Adarand filed suit in the Federal District Court in Colorado against various federal officials, alleging that the presumptions set up by the SBA violated the Equal Protection Clause.<sup>12</sup> The District Court granted the government's motion for summary judgment, and the Tenth Circuit Court of Appeals affirmed.<sup>13</sup> The Tenth Circuit, applying the "lenient" standard of review set out in *Metro Broadcasting, Inc. v. Federal Communications Commission*,<sup>14</sup> upheld the use of the additional compensation clauses for awarding subcontracts to disadvantaged businesses.<sup>15</sup> The Supreme Court of the United States granted certiorari to reevaluate the standard of review employed by the Tenth Circuit.<sup>16</sup>

In a five-four decision, a majority determined that strict scrutiny should be applied to racial classifications imposed by the federal government.<sup>17</sup> The Court stated that this standard would apply to both benign and invidious classifications because of the difficulty in discerning the difference.<sup>18</sup> In holding that strict scrutiny applied in the federal context, the Court expressly overruled *Metro Broadcasting*.<sup>19</sup>

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6. *Id.*

7. *Id.* at 2104.

8. *Id.* at 2102.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 2104.

13. *Id.*

14. 497 U.S. 547 (1990).

15. *Adarand*, 115 S. Ct. at 2104.

16. *Id.* at 2104-05.

17. *Id.* at 2113.

18. *Id.* at 2112.

19. *Id.* at 2113 (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547

### III. LEGAL BACKGROUND

The Equal Protection Clause<sup>20</sup> applies to state governments directly through the Fourteenth Amendment, and to the federal government through operation of the Due Process Clause of the Fifth Amendment.<sup>21</sup> The Equal Protection Clause guarantees that similarly situated people will be treated similarly; conversely, citizens not similarly situated for equal protection purposes may be treated differently.<sup>22</sup> One commentator has stated that "the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights."<sup>23</sup>

In the individual rights context, state and federal governments implicate the equal protection guarantee whenever they seek to apply their laws based upon racial classifications. The Supreme Court has employed equal protection analysis in the context of racial classifications several times in the past fifty years, but clear standards have yet to develop. What is clear, however, is that selection of the standard of review used to analyze the classifications is the single most important decision the Court makes in these cases.<sup>24</sup> The higher the standard of review, the more difficult it is for the law being analyzed to pass constitutional muster.<sup>25</sup> The highest standard of review in equal

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(1990), which held that benign federal racial classifications need only satisfy intermediate scrutiny).

20. U.S. CONST. amend. XIV.

21. *See, e.g.,* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (stating that Equal Protection analysis is the same under the Fourteenth and Fifth Amendments).

22. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 16-1 at 1438 (2d ed. 1988).

23. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 14.1 at 595 (5th ed. 1995).

24. The varying levels of review used by courts in modern constitutional jurisprudence is thought to come from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). *See generally* Lewis F. Powell Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

25. Three standards of review are employed in the equal protection context—rational basis, intermediate review, and strict scrutiny. NOWAK & ROTUNDA, *supra* note 23, § 14.3, at 601-06.

Rational basis is the least rigorous standard of review. *Id.* at 601. It is most often used in analyzing economic legislation, and the Court merely asks whether the law is rationally related to a legitimate goal of the government. *Id.*

Courts utilize intermediate review to analyze quasi-suspect classifications, such as those based on illegitimacy and gender. *Id.* at 603. Under this standard, the Court will uphold the classification if it has a substantial relationship to an important governmental interest. *Id.*

protection analysis is strict scrutiny, which, after *Adarand*, applies to all racial classifications. This standard requires that the law be narrowly tailored to serve a compelling governmental interest, and that the law do so through the least restrictive means possible needed to achieve that interest.<sup>26</sup> Few laws can, or have, cleared this constitutional hurdle.

One of the early modern decisions regarding racial classifications in the equal protection area was *Korematsu v. United States*.<sup>27</sup> In *Korematsu*, the Court upheld Civil Exclusion Order No. 34 under the (then implicit) equal protection component of the Fifth Amendment Due Process Clause.<sup>28</sup> Order No. 34, passed by Congress after the United States declared war on Japan, required Japanese-Americans to report to relocation camps at the direction of military officials.<sup>29</sup> The Court justified the order on the grounds of wartime necessity and fears of espionage.<sup>30</sup> Before upholding the order, however, the Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and warrant] the most rigid scrutiny [by the courts]."<sup>31</sup> This language gave the first indication that laws which operated on the basis of race required strict scrutiny to survive an equal protection challenge.

The Court's next word on the appropriate standard of review for classifications based solely upon race came in *Bolling v. Sharpe*.<sup>32</sup> The *Bolling* Court decided the constitutionality of segregation of African-Americans in the District of Columbia schools.<sup>33</sup> That same day, the Court handed down *Brown v. Board of Education*,<sup>34</sup> which held segregation in state

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Finally, the most heightened scrutiny of a classification occurs when the Court employs strict scrutiny, where it asks whether the classification is the least restrictive means to serve a compelling governmental interest. *Id.* at 601-02. Classifications analyzed under this standard include those based on race and national origin. *Id.* at 602.

26. *See supra* note 25.

27. 323 U.S. 214 (1944).

28. *Id.* at 223. The Court did not discuss the then-current view that the Fifth Amendment did not afford protection from discriminatory legislation promulgated by the federal government. *See Detroit Bank v. United States*, 317 U.S. 329, 337 (1943). The Court has changed its view on this, and now implies an equal protection component into the Fifth Amendment Due Process Clause. *See supra* note 21 and accompanying text.

29. *Korematsu*, 323 U.S. at 216-22.

30. *Id.* at 223.

31. *Id.* at 216.

32. 347 U.S. 497 (1954).

33. *Id.* at 498.

34. 347 U.S. 483 (1954).

schools violative of the Fourteenth Amendment.<sup>35</sup> The Court in *Bolling* held the segregation unconstitutional by implying an equal protection component into the Fifth Amendment.<sup>36</sup> Regarding the standard of review, the Court stated that "[c]lassifications based solely on race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."<sup>37</sup> The Court then, somewhat confusingly, applied a rational-basis standard and held the segregation unconstitutional, as it did not serve any "proper governmental objective."<sup>38</sup>

In *Loving v. Virginia*,<sup>39</sup> the Court spoke on the appropriate standard of review under the Fourteenth Amendment Equal Protection Clause for state laws based on racial classifications. *Loving* involved a challenge to the Virginia anti-miscegenation statute.<sup>40</sup> Citing *Korematsu*, the Court asserted that "racial classifications . . . [must] be subject to the 'most rigid scrutiny'."<sup>41</sup> Under that standard, the Court struck down the Virginia statutory scheme.<sup>42</sup>

The Court's next major opinion on racial classifications also involved state law. In *Board of Regents of the University of California v. Bakke*,<sup>43</sup> the Court decided the constitutionality of an admissions program instituted by the University of California-Davis medical school designed to benefit minorities by giving them a preference in the application process.<sup>44</sup> Justice Powell, in a separate opinion, stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>45</sup> It was argued in *Bakke* that "benign" racial discrimination<sup>46</sup> could not be

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35. *Id.* at 495. The Court in *Bolling* stated that "[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling*, 347 U.S. at 500.

36. *Bolling*, 347 U.S. at 500.

37. *Id.* at 499.

38. *Id.* at 500.

39. 388 U.S. 1 (1967).

40. *Id.* at 2. These statutes made interracial marriages unlawful.

41. *Loving*, 388 U.S. at 11 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

42. *Id.*

43. 438 U.S. 265 (1978) (plurality opinion).

44. *Id.* at 269-70.

45. *Id.* at 291.

46. "Benign" discrimination is the label given to remedial discriminatory measures, such as the type involved in *Bakke* (discrimination against white applicant). *Id.* at 294-95.

suspect, but Justice Powell<sup>47</sup> disagreed and proceeded to apply strict scrutiny to the discriminatory admissions scheme.<sup>48</sup> Powell acknowledged that the State has a substantial interest "in ameliorating . . . the disabling effects of identified discrimination,"<sup>49</sup> but held the admissions program at issue unnecessary to fulfill that objective.<sup>50</sup> The program thus violated the Fourteenth Amendment.<sup>51</sup>

The constitutionality of a federal statute employing racial classifications came under review two years later in *Fullilove v. Klutznick*.<sup>52</sup> The federal statute, the Public Works Employment Act of 1977, required prime contractors on federally funded projects to award at least ten percent of the federal monies granted for the employment of a "minority business enterprise" (MBE).<sup>53</sup> The Court, through Chief Justice Burger, stated that racial classifications warrant "a most searching examination to make sure that it does not conflict with constitutional guarantees."<sup>54</sup> In this case, however, the Court expressed deference to the federal statute at issue as a "considered decision of the Congress and the President,"<sup>55</sup> implying that federal legislation utilizing racial classifications would be subject to something less than strict scrutiny. Burger went on to hold the statute constitutional, but refused to expressly adopt a particular standard of review appropriate for federal statutes.<sup>56</sup> The Chief Justice evaded the issue by stating that this statute would pass either intermediate or strict scrutiny.<sup>57</sup> Justice Rehnquist (now Chief Justice) joined

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47. *Bakke* did not produce a majority opinion. At the time, though, four Justices would have treated benign racial classifications differently. *Id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part.)

48. *Bakke*, 438 U.S. at 295.

49. *Id.* at 307.

50. *Id.* at 320.

51. *Id.*

52. 448 U.S. 448 (1980).

53. *Id.* at 453-55. A MBE was defined for publicly owned companies as one owned by over fifty percent minorities. "Minorities" were further defined as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 454.

54. *Id.* at 491.

55. *Id.* at 473.

56. *Id.* at 492.

57. *Id.* The test actually employed in the case was a two-part inquiry: (1) "whether the objectives of th[e] legislation are within the power of Congress" and (2) "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means of achieving the congressional objectives." *Id.* at 473.

Justice Stewart in dissent, arguing that the federal government should be bound by the same standard as state governments.<sup>58</sup>

Six years later, the Court decided another state racial classification scheme in *Wygant v. Jackson Board of Education*.<sup>59</sup> In *Wygant*, the Board of Education (Board) entered into a collective-bargaining agreement with a teachers' union that provided minority employees a retention preference in determining future layoffs.<sup>60</sup> A plurality of the Court concluded that the program violated the Equal Protection Clause of the Fourteenth Amendment.<sup>61</sup> Justice Powell, writing for the plurality, stated that to pass constitutional muster the program would have to survive strict scrutiny; a compelling state purpose and narrowly tailored means would have to be shown.<sup>62</sup> The Board's stated purpose was to remedy past discrimination against minorities,<sup>63</sup> but the Court never reached the issue of whether such a purpose was "compelling."<sup>64</sup> Instead, Justice Powell decided that the means selected—the giving of preferential treatment in layoff decisions to minority teachers—was not sufficiently narrow to satisfy the Fourteenth Amendment.<sup>65</sup>

The latest word from the Court on the standard of review for state programs with racial classifications came in *City of Richmond v. J.A. Croson Company*.<sup>66</sup> The city program in *Croson* required a thirty percent set-aside to MBE's on city construction contracts.<sup>67</sup> Regarding the standard of review appropriate for evaluating the constitutionality of the program, a majority of the Court stated that a discriminatory state program would have to pass strict scrutiny.<sup>68</sup> The benign nature of the discriminatory program at issue made

58. *Id.* at 523.

59. 476 U.S. 267 (1986).

60. *Id.* at 270-71.

61. *Id.* at 283. This part of the plurality opinion by Justice Powell was joined by Chief Justice Burger, Justice Rehnquist, and Justice O'Connor.

62. *Wygant*, 476 U.S. at 274.

63. *Id.* at 277.

64. Justice Powell did state that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

65. *Id.* at 284.

66. 488 U.S. 469 (1989).

67. *Id.* at 477-78.

68. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, wrote the plurality opinion which applied strict scrutiny. *Id.* at 492-94. The concurring opinions of Justice Kennedy and Justice Scalia were in agreement with the plurality regarding the appropriate standard of review. *Id.* at 518 (Kennedy J., concurring); *id.* at 520 (Scalia, J., concurring). This opinion finally resolved the previous failure of a majority of the Court to decide on the proper level of scrutiny to give a remedial racial classification imposed by a state government.



no difference to the majority.<sup>69</sup> The Court further stated that remedying "societal discrimination" would not suffice as a compelling state interest.<sup>70</sup> Rather, the municipality would have to show that it was remedying past discrimination *it which it engaged* to have a compelling interest in the racially classified program.<sup>71</sup>

With the issue now ripe for decision in the context of Congressional affirmative action, the Court accepted certiorari to decide the fate of a remedial federal program based upon racial classifications one year later in *Metro Broadcasting, Inc. v. Federal Communications Commission*.<sup>72</sup> The Court, in a five-four decision, held that intermediate review was the proper standard of review for a benign federal discriminatory program. The program would be upheld if it served important governmental objectives and the means employed substantially related to those objectives.<sup>73</sup> The Court justified the different standard for federal programs on the grounds that the Court must accord more deference to the national legislature and administrative agencies than to state governments.<sup>74</sup> At issue were minority-preference programs of the F.C.C., which prioritized minorities in the application process for radio and television licenses.<sup>75</sup> The important governmental interest being served by the programs was the promotion of "minority participation in the broadcasting industry."<sup>76</sup> The Court found the two programs constitutional under the intermediate standard of review.<sup>77</sup>

The jurisprudence that culminated in *Croson* and *Metro Broadcasting* indicated that two standards of review were to be employed in determining whether a racial classification scheme violated the constitution—intermediate review for federal programs and strict scrutiny for state programs.<sup>78</sup> This choice of standards would inevitably lead to more state affirmative-action programs being struck down than federal programs.

69. *Croson*, 488 U.S. at 494.

70. *Id.* at 498-507 (Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy, Justice Stevens, and Justice White).

71. *Croson*, 488 U.S. at 504. The Court distinguished *Fullilove* by stating that the federal statute involved in that case was based upon national findings of societal discrimination. The Court found this type of finding to be too broad to justify Richmond's plan, however, and required Richmond to make findings of past discrimination in its own jurisdiction to justify remedial measures. *Id.*

72. 497 U.S. 547 (1990).

73. *Id.* at 564.

74. *Id.* at 563.

75. *Id.* at 556-57.

76. *Id.* at 552-53.

77. *Id.* at 596-97.

78. See *supra* notes 68, 73 and accompanying text.

During the five years after *Metro Broadcasting*, the composition of the Court changed. Justice Thomas joined the dissenters in *Metro Broadcasting* to pass judgment once again on the appropriate standard of review for federal affirmative action programs<sup>79</sup> in *Adarand Constructors, Inc. v. Pena*.<sup>80</sup>

#### IV. INSTANT DECISION

Justice O'Connor, writing for the majority, began by confronting the question of whether Adarand had standing to seek prospective injunctive relief.<sup>81</sup> The Court decided that Adarand had standing to seek such relief, and moved on to the all-important question of the appropriate standard of review.<sup>82</sup>

Justice O'Connor surveyed relevant case law and then noted that the Court had read the equal protection principles inherent in the Fourteenth Amendment into the Fifth Amendment's Due Process Clause, under which Adarand's federal complaint arose.<sup>83</sup> The Court stated that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."<sup>84</sup> Thus, O'Connor stated the federal program at issue in *Adarand* was subject to an equal protection analysis.<sup>85</sup>

The Court then began consideration of the appropriate standard of review to employ when evaluating the constitutionality of a federally mandated racial classification.<sup>86</sup> The Court noted that in *Richmond v. J.A. Croson Company*,<sup>87</sup> it had resolved this issue with respect to racial classifications by state governments under the Fourteenth Amendment.<sup>88</sup> In *Croson*, a majority

79. Dissenting in *Metro Broadcasting* were Chief Justice Rehnquist along with Justices O'Connor, Scalia, and Kennedy. With Justice Thomas's vote, these five justices comprised the majority decision in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

80. 115 S. Ct. 2097 (1995).

81. *Id.* at 2104. This issue was raised because Adarand was specifically requesting prospective injunctive relief regarding the set-aside programs. *Id.* The Court decided that Adarand had made an adequate showing of a potential invasion of a legally protected interest which was concrete and particularized, and such invasion was actual or imminent, as required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

82. *Adarand*, 115 S. Ct. at 2105-06.

83. *Id.* at 2108.

84. *Id.* at 2108 (quoting *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987)).

85. *Id.*

86. *Id.*

87. 488 U.S. 469 (1989).

88. *Adarand*, 115 S. Ct. at 2110.

of the Court decided that strict scrutiny should be employed for such classifications.<sup>89</sup>

The majority noted that the Court's cases through *Croson* established three general propositions regarding racial classifications imposed by the government.<sup>90</sup> These three propositions were skepticism, consistency, and congruence.<sup>91</sup> "Skepticism" related to the Court's opinions which had determined that all racial classifications were inherently suspect, thus deserving of high scrutiny.<sup>92</sup> "Consistency," O'Connor observed, resulted from the Court deciding that all racial classifications must be subject to heightened scrutiny, regardless of the intent behind such classification.<sup>93</sup> Finally, "congruence" resulted from the Court's application of Fourteenth Amendment Equal Protection jurisprudence under the Fifth Amendment Due Process Clause, so as to make the standards applicable to the federal and state governments identical.<sup>94</sup> Justice O'Connor stated that these propositions together,

lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.<sup>95</sup>

The Court then considered *Metro Broadcasting*,<sup>96</sup> and decided that opinion "squarely rejected" the proposition of congruence which had been established by the Court's earlier cases.<sup>97</sup> *Metro Broadcasting* did this by establishing a different standard of review for state and federal racial classifications.<sup>98</sup> The Court believed that in so doing, *Metro Broadcasting* undermined the other propositions of skepticism and consistency.<sup>99</sup> Accordingly, the majority overruled *Metro Broadcasting* by holding that

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89. *Id.*

90. *Id.* at 2111.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 497 U.S. 547 (1990) (subjecting racial classifications imposed by the federal government to only intermediate scrutiny).

97. *Adarand*, 115 S. Ct. at 2112.

98. *Id.*

99. *Id.*

all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.<sup>100</sup>

Justice O'Connor wrote that "[b]y refusing to follow *Metro Broadcasting*, then, we do not depart from the fabric of the law; we restore it."<sup>101</sup>

In closing the majority opinion, Justice O'Connor stated that the Court wished to dispel the notion that strict scrutiny was "strict in theory, fatal in fact."<sup>102</sup> She stated that:

[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.<sup>103</sup>

The Court then remanded the case to the District Court for a determination of whether the subcontractor clause at issue passed strict scrutiny.<sup>104</sup>

In a concurring opinion, Justice Scalia agreed with Justice O'Connor regarding the appropriate standard of review for analyzing racial classifications imposed by the federal government.<sup>105</sup> Justice Scalia went further, however, and stated that a government could "never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."<sup>106</sup> Justice Scalia stated that our Constitution does not contemplate "debtor" and "creditor" races.<sup>107</sup>

In his concurrence, Justice Thomas<sup>108</sup> wrote that "government-sponsored discrimination based on benign prejudice is just as noxious as

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100. *Id.* at 2113.

101. *Id.* at 2116.

102. *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

103. *Id.*

104. *Id.* at 2118.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2119.

discrimination inspired by malicious prejudice."<sup>109</sup> He stated that "[i]n each instance, it is discrimination, plain and simple."<sup>110</sup>

In dissent, Justice Stevens criticized the majority's departure from *Metro Broadcasting*.<sup>111</sup> Justice Stevens also criticized Justice O'Connor's propositions of skepticism, consistency, and congruence.<sup>112</sup> Finally, Justice Stevens discussed *stare decisis*,<sup>113</sup> and concluded that he would have affirmed the judgment of the Court of Appeals.<sup>114</sup>

## V. COMMENT

### A. Present Effects of *Adarand*

*Adarand* drastically alters the landscape with respect to federal affirmative action programs. The decision has affected minority businesses, the executive branch of the federal government (especially administrative agencies such as the Federal Communications Commission), the Congress, and, of course, the lower federal courts. In addition, state legislatures have been influenced by the decision, and various commentators have leveled criticism at the Court. The "ripple effects" of this decision are still being felt throughout all forms of affirmative action programs, and the decision has produced much commentary.<sup>115</sup>

109. *Id.*

110. *Id.*

111. *Id.* at 2127 (Stevens, J., dissenting joined by Justice Ginsburg).

112. *Id.* at 2120-27.

113. *Id.* at 2126-28.

114. *Id.* at 2131. Justice Souter and Justice Ginsburg also authored dissenting opinions. *Id.* at 2131, 2134. Justice Souter stated that he agreed with Justice Steven's views regarding *stare decisis*, and would have followed precedent. *Id.* at 2133-34. Justice Ginsburg believed that the majority's opinion constituted judicial activism, and that the Court should have deferred to the political branches. *Id.* at 2134-36.

115. See, e.g., Koteles Alexander, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367 (1995) (criticizing the decision as based upon political motivations rather than any rule of law); Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence—Adarand Constructors, Inc. v. Pena*, 31 HARV. C.R.-C.L. L. REV. 223 (1996) (criticizing the adoption of strict scrutiny for all racial classifications); Donald L. Beschle, "You've Got to be Carefully Taught": *Justifying Affirmative Action After Croson and Adarand*, 74 N.C. L. REV. 1141 (1996) (arguing that social science supports affirmative action); Danielle Conway-Jones & Christopher L. Jones, Jr., *Department of Defense Procurement Practices After Adarand: What Lies Ahead for the Largest Purchaser of Goods and Services and Its Base of Small Disadvantaged Contractors*, 39 HOW. L.J. 391 (1995) (discussing impact of *Adarand* on defense

The President initially responded to the *Adarand* decision by ordering the Department of Justice to review all federal affirmative action programs to determine their viability.<sup>116</sup> The Justice Department issued a memorandum on February 29, 1996, in an attempt to give guidance to federal agencies regarding affirmative action programs.<sup>117</sup> The memo began by stating that

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procurement contracting since the demise of the "rule of two"); Patricia A. Carlson, *Adarand Constructors, Inc. v. Pena: The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423 (1996) (comparing *Adarand* to judicial activism of *Lochner* era); E'Vinski Davis, Note, *Adarand Constructors, Inc. v. Pena: Turning Back the Clock on Minority Set-Asides*, 23 S.U. L. REV. 79 (1995) (criticizing the court for deviating from precedent); Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673 (1996) (arguing that the Court's decisions, including *Adarand*, have little effect on affirmative action programs); Karen B. Dietrich, Note, *Federal Affirmative Action After Adarand Constructors, Inc. v. Pena*, 74 N.C. L. REV. 1259 (1996) (arguing that *Adarand* permits the continued use of limited affirmative action programs); Brian C. Eades, Note, *The United States Supreme Court Goes Color-Blind: Adarand Constructors, Inc. v. Pena*, 29 CREIGHTON L. REV. 771 (1996) (supporting result in *Adarand* by arguing that affirmative action is inconsistent with Equal Protection); Charles J. Falletta, Note, *Fifth and Fourteenth Amendments—Due Process and Equal Protection—Federal Affirmative Action Programs, Like Those of a State . . .*, 6 SETON HALL CONST. L.J. 295 (1995) (reporting on *Adarand* and predicting on the possible effects of the decision); Leslie Gentile, Note, *Giving Effect to Equal Protection: Adarand Constructors, Inc. v. Pena*, 29 AKRON L. REV. 397 (1996) (criticizing the Court's focus on process rather than on outcomes in the affirmative action context); Rheba C. Heggs, *Practitioner's Viewpoint: What to Expect After Adarand*, 25 PUB. CONT. L.J. 451 (1996) (predicting new uncertainty in federal set-asides will increase work for agency and private attorneys litigating over the programs); Terrence M. Lewis, Comment, *Standard of Review Under the Fifth Amendment Equal Protection Component: Adarand Expands the Application of Strict Scrutiny*, 34 DUQ. L. REV. 325 (1996) (criticizing the Court's "conservative" approach to affirmative action); Stephen C. Minnich, Comment, *Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action*, 46 CASE W. RES. L. REV. 279 (1995) (supporting the result in *Adarand* as a positive step towards decreasing the significance of race); William P. Pendley, *Adarand Constructors, Inc. v. Pena: Reflections on an Appearance Before the United States Supreme Court*, 31 LAND & WATER L. REV. 561 (1996) (plaintiff's lawyer reflecting on *Adarand*); Donna Thompson-Schneider, *Paved With Good Intentions: Affirmative Action After Adarand?*, 31 TULSA L.J. 611 (1996) (predicting that *Adarand* will encourage protracted litigation); Jerome R. Watson and Akinyale Harrison, *Government Contracting: Affirmative Action After Adarand*, 74 MICH. B.J. 1162 (1995) (stating that the affect of *Adarand* is not clear as the strict scrutiny standard adopted was not applied by the Court).

116. Steven G. Reade & Rosemary Maxwell, *Labor Law*, THE NATIONAL LAW JOURNAL, Feb. 19, 1996, at B6-7.

117. *Justice Department Memo on Post-Adarand Affirmative Action Guidance*,

the Clinton administration strongly supports affirmative action (AA) programs and planned to continue its efforts in the area.<sup>118</sup> It stated that racially-based decision making is defensible after *Adarand* if the agency has a "demonstrable factual predicate for its actions" such as statistical evidence of past discrimination by that agency (through a "disparity study") or a legitimate operational need for minority representation.<sup>119</sup> One example given of such an operational need was the need for minority police officers in order to achieve the community support required for the effective law enforcement in various communities.<sup>120</sup> Further, the Justice Department advised that any programs should be narrow in scope and limited in time.<sup>121</sup> The memo comports with President Clinton's belief that although some programs need work, he does not believe it is necessary to end all affirmative action.<sup>122</sup>

Ironically, in the months since the February memorandum was issued by the Justice Department, a new industry has been born to help governments friendly toward AA justify their programs under *Adarand*—the disparity study business. Terry Eastland, author of a new book entitled *Ending Affirmative Action: The Case for Colorblind Justice*, reports that "the disparity study industry has become big business."<sup>123</sup> In fact, this "business" has cost U.S. taxpayers \$45 million.<sup>124</sup> Despite the money being spent, Eastland argues the studies are result-oriented; disparity is often found.<sup>125</sup> In a study conducted in Oregon, no actual cases of discrimination in government contracting were found, but the study found "discrimination" nonetheless.<sup>126</sup> Eastland is not surprised by this—he says that "[t]he whole point of these disparity studies is to find discrimination."<sup>127</sup>

Despite the Justice Department's memo in support of AA programs, the Clinton administration ordered a three-year moratorium on any new set-aside

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DAILY LABOR REPORT, March 5, 1996 at D31, available in LEXIS, News Library, Dlabrt File.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Claude R. Marx, *Will Race Surface as an Issue? Not Now, But Clinton Faces GOP Attacks in Fall*, INVESTORS BUSINESS DAILY, Feb. 23, 1996, at A1, available in WESTLAW, 1996 WL 3586948 (The President was quoted as saying "Mend it, don't end it.").

123. David Reinhard, *Eastland's Case for Colorblind Justice*, PORTLAND OREGONIAN, July 25, 1996, at D08, available in WESTLAW, 1996 WL 4162596.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

programs.<sup>128</sup> As for the existing affirmative action programs, though, one report indicated that months later "all 165 federal affirmative action programs are still in place."<sup>129</sup>

To further his goal of continuing AA, the President announced that he was considering signing an executive order near the end of 1995.<sup>130</sup> The order would establish "empowerment contracting," which focuses on economics, rather than race or gender criteria, when aiding businesses with evaluation preferences to help them give competitive bids for federal contracts.<sup>131</sup> A business would qualify for such preferences if it was "located in an 'area of general economic distress' or if it employs 'a significant number of residents' from such an area."<sup>132</sup> The Secretary of Commerce would determine what areas qualify to be considered of "general economic distress," using such factors as "unemployment rate, degree of poverty, rate of business formation, and rate of business growth."<sup>133</sup> Race would not be a factor in awarding the contracts. Rather, geographic criteria would determine what companies were eligible.<sup>134</sup> The order was signed on May 21, 1996.<sup>135</sup>

President Clinton, in addition to pursuing the above-described executive order, has employed a different strategy for his administration in its continued support of AA programs—avoiding any substantial changes in the majority of the current programs. One editorial writer stated that "Bill Clinton's policy on racial preferences has always been to deceive the people by talking moderately while ordering bureaucrats to run as far left as possible."<sup>136</sup> Clinton's "policy" has been implemented in many ways, the most pronounced of which is the notice of proposed reforms to AA programs recently promulgated by the Department of Justice.

128. *Moratorium Called on Minority Contract Program*, NEW YORK TIMES, March 8, 1996, at A1.

129. *The Affirmative Action Dilemma*, INVESTORS BUSINESS DAILY, June 17, 1996 at A2, available in WESTLAW, 1996 WL 10195788 [hereinafter *The Affirmative Action Dilemma*].

130. *Draft EO on Empowerment Contracting Would Tie Preference to Location*, DAILY REPORT FOR EXECUTIVES, Oct. 2, 1995 at Section A, at 190, available in LEXIS, News Library, Drexec File.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Government Contracts, Administration Expected to Propose Empowerment Contracting Initiative*, DAILY REPORT FOR EXECUTIVES, Sept. 13, 1996, Section A, available in LEXIS, News Library, Drexec File.

136. Greg Forster, *Change Everything, Don't Change A Thing*, THE WASHINGTON TIMES, April 11, 1996, at A17, available in LEXIS, News Library, Wtimes File.



On May 23, 1996, the Justice Department issued a report proposing reforms to affirmative action programs used in federal procurement.<sup>137</sup> The memorandum proposes the employment of "benchmarks" establishing the desired level of minority participation in a given industry by calculating what level of minority participation would exist in the industry absent discrimination.<sup>138</sup> The proposal sets out several potential programs which employ racial preferences, such as bidding advantages, to bring the level of minority participation up to the "ideal" level.<sup>139</sup> This new plan would leave affirmative action programs in place, and in some instances even expand present AA efforts.<sup>140</sup>

The Justice Department memo has received some critical attention since its issuance because, reports argue, the changes it recommends are not real changes at all. One author writes that "between the lines there's an unmistakable message: don't change a thing."<sup>141</sup> Another writer criticizes the new proposals as "no new thinking but a parade a euphemisms . . . 'goals and timetables' become 'benchmarks,' and 'set-asides' become 'sheltered bidding.'"<sup>142</sup> It remains uncertain which of the new changes will be implemented, and even less clear whether they could withstand judicial review.

Clinton's 1995 proposed executive order discussed above mirrors in many ways a draft bill introduced by Senator Christopher Bond (Republican-Missouri).<sup>143</sup> Bond's proposal is also an empowerment strategy, and it would direct that up to five percent of federal contracts be awarded to companies located in Historically Underutilized Business Zones (HUBZones).<sup>144</sup> A HUBZone would be defined as "a location in which at least fifty percent of the households have an income of less than sixty percent of the Area Median Gross Income for the most recent year for which census

137. 61 Fed. Reg. 26042 (1996).

138. 61 Fed. Reg. 26045 (1996).

139. 61 Fed. Reg. 26046 (1996).

140. For example, one report indicates the plan would expand the use of a ten percent bid preference to minority contractors, now only used in defense contracting, to all government procurements. David A. Price, *Keeping Gov't Color-Conscious*, INVESTORS BUSINESS DAILY, June 4, 1996, at A1, available in WESTLAW, 1996 WL 10195532.

141. Forster, *supra* note 136, at A17.

142. Clint Bolick, *Rule of Law: So Far, Clinton Can't Kick His Quota Addiction*, THE WALL STREET JOURNAL, June 12, 1996, at A17.

143. *Bond to Offer Bill to Create Race-Neutral and Gender Neutral Small Business Programs*, DAILY REPORT FOR EXECUTIVES, Dec. 15, 1995 at Section A, at 241, available in LEXIS, News Library, Drexec File.

144. *Id.*

data are available."<sup>145</sup> This legislation would not specifically replace the section 8(a) program at issue in *Adarand*, but would come before that program in priority.<sup>146</sup> The critical distinction between the Bond draft bill and Clinton's proposed executive order is that to qualify under Bond's proposal the business would also have to qualify as "small," whereas Clinton's proposal gives no restrictions on the size of an otherwise qualified business.<sup>147</sup>

Bond's proposal is not the only Republican measure under consideration since *Adarand*. Republican presidential candidate, former Senator Bob Dole (Republican-Kansas), and Representative Charles Canady (Republican-Florida) co-sponsored a bill that would eliminate all race-based AA programs in federal contracting.<sup>148</sup> A House Judiciary subcommittee approved that bill on March 7, 1996.<sup>149</sup> Henry Hyde (Republican-Illinois), Chairman of the Judiciary Committee, stated that he hoped for a full Committee vote on the measure "soon."<sup>150</sup>

Senator Bond's empowerment proposal will likely be used to "complement the planned Republican rollback of affirmative-action programs" such as the Dole-Canady measure.<sup>151</sup> Taken together, these Republican efforts could eliminate AA programs as they are presently known. Republican presidential candidate Bob Dole has not stressed these efforts in his campaign, but one report suggests that Dole will likely begin to emphasize his views on AA programs, as "resentment of racial preferences . . . is strong among the 20 percent or so of voters who are most up for grabs in this year's presidential race."<sup>152</sup>

The political branches are not alone in responding to the *Adarand* decision. Perhaps the most drastic changes can be seen in the response by the various administrative agencies, such as the Federal Communications Commission, Department of Defense, Department of the Treasury, and the National Aeronautics and Space Administration. All of these agencies have

145. *Id.*

146. *Id.*

147. *Id.*

148. Neil Munro, *Rival Plan Threatens 8(a) Firms*, WASHINGTON TECHNOLOGY, Feb. 8, 1996, available in WESTLAW, 1996 WL 8827040.

149. Nancy Montwieler, *Affirmative Action: House Subcommittee Approves Bill Barring Federal Preferential Treatment*, DAILY LABOR REPORT, March 8, 1996, at D10 available in LEXIS, News Library, Dlabrt File.

150. *Id.* As of September 3, 1996, the provision had not yet been approved. See *Legislation: Congress Returns from August Recess to Consider Appropriations, Labor Bills*, DAILY LABOR REPORT, Sept. 3, 1996, available in LEXIS, News Library, Dlabrt File.

151. Montwieler, *supra* note 149, at D10.

152. *The Affirmative Action Dilemma*, *supra* note 129.

issued regulations either soliciting comment or promulgating new rules in order to continue their contracting programs in light of *Adarand*.

The Federal Communications Commission (FCC) has been very active in responding to *Adarand*. The FCC removed race and gender preferences from bidding procedures for wireless "spectrum-based" communication technologies in a final rule issued July 21, 1995.<sup>153</sup> The FCC removed these preferences to avoid litigation in direct response to *Adarand*.<sup>154</sup> A similar removal of racial and gender preferences from the bidding process was implemented in the auction of personal communication services.<sup>155</sup>

On September 21, 1995, the FCC issued final auction rules for 900 MHz Specialized Mobile Radio (SMR) services.<sup>156</sup> Under this regulation, the FCC gave bidding preferences to "small businesses," defined as businesses with average gross revenues over the preceding three years of \$3 million or less for one category or \$15 million or less for another category.<sup>157</sup> Interestingly, this approach is similar to the empowerment contracting approach proposed by the President and by former Senator Dole, which avoid strict scrutiny by not employing racial classifications.<sup>158</sup>

The FCC has also sought comment on a proposed rule which would increase minority and gender-owned business involvement in the bidding for lower 800 MHz SMR services.<sup>159</sup> The final rule that will be implemented in this area is also likely to take an empowerment approach, as the regulation commented that according to current census data, ninety-nine percent of minority and women-owned businesses generate less than \$1 million in annual receipts.<sup>160</sup> This led the FCC to posit that virtually any definition it gave of "small business" would encompass these businesses, hence having the effect of giving them bidding preferences on the basis of economic classifications rather than racial or gender classifications.<sup>161</sup>

In the paging services area, the FCC has also solicited comment on whether, given the huge capital investment needed in the area, a program that explicitly gave preference to minority and women-owned businesses could pass strict scrutiny under *Adarand*.<sup>162</sup>

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153. 60 Fed. Reg. 37786 (1995) (to be codified at 47 C.F.R. pts. 20, 24).

154. 60 Fed. Reg. at 37787-87 (1995) (to be codified at 47 C.F.R. pts. 20, 24).

155. 61 Fed. Reg. 33859 (1996) (to be codified at 47 C.F.R. pts. 20, 24).

156. 60 Fed. Reg. 48913 (1995) (to be codified at 47 C.F.R. pt. 90).

157. 60 Fed. Reg. 48916 (1995) (to be codified at 47 C.F.R. pt. 90).

158. See *supra* notes 132-45 and accompanying text.

159. 61 Fed. Reg. 6212, 6227 (1996) (to be codified at 47 C.F.R. pt. 90).

160. 61 Fed. Reg. 6212, 6227 (1996) (to be codified at 47 C.F.R. pt. 90).

161. 61 Fed. Reg. 6212, 6227 (1996) (to be codified at 47 C.F.R. pt. 90).

162. 61 Fed. Reg. 6199 (1996) (to be codified at 47 C.F.R. pts. 72, 90).

The Department of Defense has also responded to the *Adarand* decision. On October 27, 1995, the Defense Department suspended one of its programs which awarded contracts based upon racial preferences.<sup>163</sup> The suspended program was known as section 1207,<sup>164</sup> or the "Rule of Two."<sup>165</sup> Under this rule, the Defense Department would reserve a contract for a Small Disadvantaged Business (which were determined in part by racial classifications) whenever two or more of these companies were eligible to bid a on a contract.<sup>166</sup> Despite this suspension, however, the Department of Defense expressly encouraged contracting officials to continue to award contracts under the section 8(a) program at issue in *Adarand*, and it has proposed regulations that would increase minority preferences.<sup>167</sup> Indeed, the Defense Department promulgated a new rule on April 29, 1996, designed to "limit the adverse impact" of the set-aside suspension.<sup>168</sup> This new program requires the use of bidding preferences for minority and women-owned firms, and arguably runs counter to the intent of the *Adarand* Court.<sup>169</sup>

The Office of Federal Contract Compliance Programs (OFCCP) responded to *Adarand* by stating that it was not affected by the decision.<sup>170</sup> The OFCCP enforces Executive Order 11246, a thirty-year-old measure implemented by President Nixon, which requires companies awarded federal contracts of \$50,000 or more to establish and maintain written affirmative action programs.<sup>171</sup> Shirley J. Wilcher, Director of the OFCCP, stated that since the order does not require decision-making based upon racial criteria, it falls outside the reach of *Adarand*.<sup>172</sup> It remains unclear if the director's position would be tenable if challenged in court.

Other agencies that have responded include the Department of the Treasury and the National Security Agency (NSA). The Director of the NSA testified before Congress that he is modifying a program of that agency

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163. 60 Fed. Reg. 54954 (1995) (to be codified at 47 C.F.R. pt. 73).

164. Reade & Maxwell, *supra* note 116, at B6.

165. *DOD Suspends Use of 'Rule of Two,' Recommits to Increasing Awards to SDB's*, DAILY REPORT FOR EXECUTIVES, Oct. 24, 1995, at Section A, 205.

166. *Id.*

167. Reade & Maxwell, *supra* note 116, at B6.

168. 61 Fed. Reg. 18686 (1996) (to be codified at 48 C.F.R. pts. 217, 219, 236, 242, 252, 253).

169. 61 Fed. Reg. 18686 (1996) (to be codified at 48 C.F.R. pts. 217, 219, 236, 242, 252, 253).

170. *OFCCP Offices Experiencing 'Interesting' Reaction to Court Case*, DAILY REPORT FOR EXECUTIVES, Sept. 19, 1995, Section A, at 181.

171. *Id.*

172. *Id.*

designed to increase hiring of minority and female scientists to comply with *Adarand*.<sup>173</sup> The Department of the Treasury issued a final rule involving the Office of the Comptroller of the Currency (OCC) procurement contracts.<sup>174</sup> The regulation states that since the OCC focuses on outreach, or increasing the applicant pool with qualified minority or female candidates without excluding other qualified candidates, its program is not impacted by the *Adarand* decision.<sup>175</sup>

The administrative agencies mentioned above seem to be taking various steps to comply with, or sidestep, *Adarand*. Ultimately, the constitutionality of these measures will be determined in the courts. The first case to hold a federal racial preference program unconstitutional in light of *Adarand* was *Cornelius v. Los Angeles County Metropolitan Transportation Authority*,<sup>176</sup> decided by a California state court. Another important case, however, was heard by a Clinton appointee, Judge Emmitt Sullivan, on March 8th.<sup>177</sup> The case, brought by Dynalantic Corp., Deer Park, New Jersey, challenged the 8(a) program at issue in *Adarand* in the context of a helicopter training device contract set-aside.<sup>178</sup> The Department of Justice (DOJ) was supported in defending the program by amicus briefs, including one filed by the National Federation of 8(a) Companies.<sup>179</sup> The DOJ argued that the 8(a) programs pass strict scrutiny under *Adarand*, making particular reference to Justice O'Connor's reminder that strict scrutiny is not "fatal in fact."<sup>180</sup> Dynalantic argued that the Court need not give special deference to Congress with the section 8(a) programs because they are strictly federal in nature, hence falling outside section 5 of the Fourteenth Amendment which gives Congress powers to regulate actions by the states.<sup>181</sup> Additionally, Dynalantic argued that the evidence of past discrimination put forward by the DOJ to support the program was insufficient.<sup>182</sup> Ultimately, Dynalantic lost the litigation, as the Judge Sullivan ruled that Dynalantic lacked standing to bring the action.<sup>183</sup>

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173. Reade & Maxwell, *supra* note 116, at B6.

174. 60 Fed. Reg. 57315 (1995) (to be codified at 12 C.F.R. pts. 9, 10, 11, 18).

175. 60 Fed. Reg. 57315 (1995) (to be codified at 12 C.F.R. pts. 9, 10, 11, 18).

176. No. BC 101913, 1995 WL 499822 (Cal Super. Ct. July 27, 1995).

177. Munro, *supra* note 148.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Dynalantic Corp. v. United States Dept. of Defense*, No. CIV. A. 95-2301(EGS), 1996 WL 475841 (D.D.C. May 20, 1996).

In another context, the Fifth Circuit has struck down the use of racial classifications in University of Texas law school admissions.<sup>184</sup> The court stated that the achievement of "diversity" was not a compelling governmental interest sufficient to employ racial classifications in decision-making.<sup>185</sup> This decision has caused much concern among college deans, as it could signal the "beginning of the end" of the use of racial preferences in admission decisions.<sup>186</sup> It caused concern for the Clinton administration as well, and the administration voiced those concerns to the United States Supreme Court in a memorandum asking the High Court to overturn the Fifth Circuit's decision.<sup>187</sup> The Supreme Court ultimately denied certiorari.<sup>188</sup>

Finally, minority businesses themselves seem to have been affected by the *Adarand* decision. In the Chicago area, minority businesses reported that they are being awarded fewer federal contracts since the decision.<sup>189</sup> Additionally, one report indicates that minority-owned defense contractors have been awarded significantly fewer contracts since the Department of Defense suspension of the "rule of two" program.<sup>190</sup>

### *B. Analysis of the Impact of Adarand*

From a legal standpoint, one potential impact of the *Adarand* decision in lower courts is that benign, gender-based discrimination could pass scrutiny more easily than a benign, race-based program.<sup>191</sup> This is an anomalous result, due to popular perception that, in the history of this country, discrimination based upon race has been more severe than gender-based discrimination. At least two lower courts, however, have mechanically applied the different standards of review in the race and gender context without commenting on this apparent inconsistency. In both *Baker v. United*

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184. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

185. David E. Rovella, *Circuit Ruling Challenges 'Bakke,' Threatens Law School Diversity*, THE NATIONAL LAW JOURNAL, April 1, 1996, at A15.

186. *Id.*

187. Linda Greenhouse, *White House Asks Supreme Court to Review Affirmative Action Ruling*, LOS ANGELES DAILY NEWS, May 25, 1996, at N17.

188. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

189. Francine Knowles, *Minority Firms Feel Court Rulings Effects*, CHICAGO SUN-TIMES, Feb. 8, 1996, available in WESTLAW, 1996 WL 6730669.

190. *Washington Insider*, SET-ASIDE ALERT (Small Business Press, Washington, D.C., July 29, 1996).

191. This is because race-based classifications are now subject to strict scrutiny, whereas gender-based classifications are still subject to intermediate review.

*States*<sup>192</sup> and *Shuford v. Alabama State Board of Education*<sup>193</sup> the courts applied strict scrutiny to the racial classification before it, while applying intermediate review to the gender classification.

This anomalous application of the two standards of review has produced commentary advocating that strict scrutiny should be applied to gender classifications as well as racial classifications.<sup>194</sup> John Galotto correctly points out that the rationale underlying the application of strict scrutiny to racial classifications also applies to gender classifications. For instance, "the concern . . . about legislative reliance on racial stereotypes applies with equal force to gender stereotypes."<sup>195</sup> Also, "whatever stigma the *Croson* court felt would attach to the beneficiaries of racial preferences would likewise afflict beneficiaries of gender preferences."<sup>196</sup> The rigid application of intermediate review to gender classifications in the lower courts will likely cause criticism regarding post-*Adarand* affirmative action jurisprudence.

In the political branches, the record seems to bear out President Clinton's critics—his administration is doing everything within its power to continue affirmative action programs as if *Adarand* had never been decided.<sup>197</sup> The most recent "reforms" recommended by the Justice Department are little more than semantics, and what remains most important in the majority of federal contracts is one's pigmentation. The Clinton administration perpetuates outdated views on racial relations by ignoring the mandates, and the spirit, of the *Adarand* decision. Jeff Jacoby, a writer for *The New Orleans Times-Picayune*, writes that:

the heart of Jim Crow beats on . . . [t]he belief that people are first and foremost members of a race is alive and well and living under the rubric "affirmative action"—or, as we now call it, "diversity." . . . Only if the most meaningful thing about each of us is our pigmentation can the quotas and preferences of affirmative action—or the segregated railway cars of Jim Crow—make sense.<sup>198</sup>

The most noxious result of the continuation of affirmative action programs for the achievement of diversity, so as to ensure that all perspectives

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192. 1995 WL 746559 (Ct. Cl. December 12, 1995).

193. 897 F. Supp. 1535 (M.D. Ala. 1995).

194. See John Galotto, *Strict Scrutiny for Gender, via Croson*, 93 COLUM. L. REV. 508 (1993).

195. *Id.* at 536.

196. *Id.*

197. See *supra* note 136 and accompanying text.

198. Jeff Jacoby, *We're Still Counting by Race 100 Years after Plessy*, THE NEW ORLEANS TIMES-PICAYUNE, April 27, 1996, at B7.

are represented, is the reinforcement of the bigot's belief structure—that there is a "black" way of thinking and a "white" way of thinking. Jeff Jacoby writes that this leads to the logic that "above all else, we are black or we are white . . . [k]now a man's color, and you know how he thinks, how he acts, what he wants, what he is."<sup>199</sup> This result runs counter to the good intentions of the people designing AA programs, but everyone knows what road good intentions pave.

More than seventy percent of Americans polled today oppose racial preferences.<sup>200</sup> As one author states, this opposition is not "evidence of growing racism . . . [t]he concept that rights are rooted in each individual, not in any group, is fundamental to the American creed."<sup>201</sup> If set-asides, or "benchmarks," are to continue, racial criteria should be cast aside and economic factors should be employed to determine eligibility for assistance programs. This would enable the administrators of such programs to better identify the companies that need the assistance, regardless of the demographics of their owners. Public perception of such programs could only become more favorable as a result. Programs such as those proposed by Senator Bond,<sup>202</sup> which have an economic focus, would increase the perception of legitimacy of government set-aside programs. Consequently, Americans from all racial backgrounds will be able to see the good coming from such classifications. Further, as the FCC noted, virtually any definition of "small business" would include the racial and gender groups currently singled out for assistance.<sup>203</sup>

We are a nation of Americans. There was a time when AA programs were necessary to ensure that we, as Americans, believed that we were one nation of diverse citizenship. Today, the continuation of such programs only serves to reinforce the racial divide in this country—something our government should be loathe to do. The United States government helping small, start-up companies in less-than-prosperous communities is admirable; that same government helping citizens based solely on their racial background is troublesome. The employment of economic criteria for the determination of eligibility for government set-asides will help Americans of all races who need the assistance, and if widely used it could come a long way toward aiding the relations between the races in this country.

Classifications based on race are a constant reminder of the division among the American population. Economic classifications could serve the same goals of current affirmative action programs without such a reminder.

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199. *Id.*

200. *The Affirmative Action Dilemma*, *supra* note 129, at A2.

201. Robert J. Bresler, *Affirmative Action on the Rocks*, USA TODAY, July 1, 1996, at 7.

202. *See supra* notes 143-47 and accompanying text.

203. *See supra* notes 160-61 and accompanying text.



Indeed, the economic classifications may be more proficient in serving those goals—giving aid to those who need it. It is time that the citizens of the United States begin to see ourselves as the rest of the world views us—as Americans.

## V. CONCLUSION

The controversy over affirmative action will undoubtedly continue in the post-*Adarand* world. Affirmative action seeks to put races victimized in the past where they would have been absent such treatment. The problem is no one can know "where" that is. Thus, the proportional representation assumption of modern affirmative action programs is flawed.<sup>204</sup> *Adarand* has set the stage for a battle on affirmative action not just in the courts, but also in the executive branch, Congress, and state governments. It is uncertain whether the Court has signalled that affirmative action has reached its high-water mark in this country, but it is clear that the Clinton administration is not listening to any message the Court may be trying to send. As long as tension exists between what is politically "popular" and what is constitutionally permissible, the disregard for the *Adarand* decision by the political branches will likely continue.

The continuing emphasis of race and ethnicity by the state and federal governments only serves to increase the racial divide in this country. Distributing benefits on such a basis undeniably increases racial tensions and stigmatizes all of the individuals eligible to be "beneficiaries" of the program, whether they actually received assistance or not. Despite the best of intentions on the part of affirmative action program supporters, the programs fail to do what civil rights activists originally intended—to ensure that individuals are given a fair chance regardless of their racial background. It is time that supporters of affirmative action in the United States contemplate the oft-quoted statement describing self-defeating behavior—"We have met the enemy, and he is us."<sup>205</sup>

CHARLES J. DYKHOUSE

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204. In his book *THE END OF RACISM*, Dinesh D'Souza challenges this basic proportional representation assumption of modern affirmative action programs in effect in this country. Dinesh D'Souza, *The Law of Averages Leads to Oppression*, CONN. LAW TRIBUNE, Oct. 2, 1995, at 18.

205. RESPECTFULLY QUOTED 102 (Suzy Plat ed., 1989) (citation omitted).